Office - Supreme Court, U.S.
FILED
NOV 2 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-702

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *et al.*,

Petitioners,

—v.—

ROBERT W. KELLEY, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

JACK GREENBERG
JAMES M. NABRIT, III
THEODORE M. SHAW
BILL LANN LEE*
Suite 2030
10 Columbus Circle
New York, New York 10019
(212) 586-8397

AVON N. WILLIAMS, JR.
RICHARD H. DINKINS
203 Second Avenue, North
Nashville, Tenn. 37201
(615) 244-3988

Attorneys for Respondents

*Counsel of Record

INDEX

Page

Table of Cases i

Statement 1

Prior Proceedings 3

Post-1971 Proceedings 6

The Decision Below 16

Reasons to Deny the Writ 21

Conclusion 34

Table of Cases

Adams v. United States, 620 F.2d 1277 (8th Cir.), cert. denied, 449 U.S. 826 (1980) 30

Berenyi v. Information Director, 385 U.S 630 (1967) 22

Blau v. Lehman, 368 U.S. 403 (1962) 22

Brown v. Board of Education, 349 U.S. 294 (1955) 23

Columbus Board of Education v. Penick, 443 U.S. 449 (1979), affirming, 583 F.2d 878 (6th Cir. 1978) .. 23,24,25

Davis v. School Comm'rs of Mobile County, 402 U.S. 33 (1976) 25

Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979), affirming, 583 F.2d 243 (6th Cir. 1978) 24

Page

Flax v. Potts, 464 F.2d 865 (5th Cir. 1972), cert. denied, 409 U.S. 1007 (1972) 30

Goss v. Board of Education, 373 U.S. 683 (1963) 2,3

Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1979) 22

Green v. County School Board, 391 U.S. 430 (1968) 24,29

Haycraft v. Board of Education, 585 F.2d 803 (6th Cir. 1979), cert. denied, 443 U.S. 915 (1979) 30

Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, ___ F.2d ___ (6th Cir. 1982) 2

Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, 492 F. Supp. 167 (M.D. Tenn. 1980) 2

Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, 479 F. Supp. 120 (M.D. Tenn. 1979) 2,12

Page

Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, 372 F. Sup. 540 (M.D. Tenn. 1973 2

Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, 372 F. Supp. 528 (M.D. Tenn. 1973) 2

Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, 463 F.2d 732 (6th Cir.), cert. denied, 409 U.S. 1001 (1972) 2,4,6

Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, 436 F.2d 856 (6th Cir. 1970) 2,4

Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, 317 F. Supp. 980 (M.D. Tenn. 1970) 2

Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, 293 F. Supp. 485 (M.D. Tenn. 1968) 2

Kelley v. Board of Educationof City of Nashville, 270 F.2d 209 (6th Cir.), cert. denied, 361 U.S. 924 (1959) 2,3

Page

Kelley v. Board of Education of Nashville, 8 Race Rel. L. Rpte. 651 (M.D. Tenn. 1958) 2

Kelley v. Board of Education of City of Nashville, 159 F. Supp. 272 (M.D. Tenn. 1958) 2

Kelley v. Board of Education of City of Nashville, 139 F. Supp. 578 (M.D. Tenn. 1956) 2

Keyes v. School District No. 1, 412 U.S. 189 (1973) 25

Keyes v. School District No. 1, 521 F.2d 465 (10th Cir. 1975), cert. denied, 423 U.S 1066 (1976) 30

Lee v. Macon County Board of Education, 616 F.2d 805 (5th Cir. 1980) 30

Liddell v. Board of Education of City of St. Louis, 667 F.2d 643 (8th Cir. 1981) 28

Maxwell v. County Board of Education of Davidson County, 301 F.2d 828 (6th Cir. 1962) 2

Metropolitan County Board of Education v. Kelley, 453 U.S. 1306, 50 U.S.L.W. 3198 (1981) 16

Milliken v. Bradley, 433 U.S. 267 (1977) 18

Monroe v. Board of Comm'rs, 391 U.S. 450 (1968) 33

Page

Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976) 21,23

Rodgers v. Lodge, ___ U.S. ___, 50 U.S.L.W. 5041 (1982) 22

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S 1 (1971) 5,17,18,24,27,28, 29,32

Wright v. Council of City of Emporia, 407 U.S. 451 (1972) 24

No. 82-702

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

==========

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,

Petitioners,

v.

ROBERT W. KELLEY, et al.

==========

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

==========

BRIEF IN OPPOSITION

==========

Respondents Robert W. Kelley, et al., oppose the petition for certiorari.

Statement

This school desegregation action was originally filed in 1955, and has been the

subject of numerous judicial opinions.[1/] A brief history of the litigation follows.

1/ The published opinions include: Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, ___ F.2d ___ (6th Cir. 1982) (A-1); 511 F. Supp. 1363 (M.D. Tenn. 1981) (A-128); 492 F. Supp. 167 (M.D. Tenn. 1980) (A-62); 479 F. Supp. 120 (M.D. Tenn. 1979) (A-38); 372 F. Supp. 540 (M.D. Tenn. 1973); 372 F. Supp. 528 (M.D. Tenn. 1973); 463 F.2d 732 (6th Cir.), cert. denied, 409 U.S. 1001 (1972); 436 F.2d 856 (6th Cir. 1970); 317 F. Supp. 980 (M.D. Tenn. 1970); 293 F. Supp. 485 (M.D. Tenn. 1968); Goss v. Board of Education, 373 U.S. 683 (1963) (consolidated cases); Maxwell v. County Board of Education of Davidson County, 301 F.2d 828 (6th Cir. 1962); 203 F. Supp. 768 (M.D. Tenn. 1960); Kelley v. Board of Education of City of Nashville, 270 F.2d 209 (6th Cir.), cert. denied, 361 U.S. 924 (1959); 8 Race Rel. L. Rptr. 651 (M.D. Tenn. 1958); 159 F. Supp. 272 (M.D. Tenn. 1958); 139 F. Supp. 578 (M.D. Tenn. 1956).

The extensive history of the litigation is summarized in the opinions of the court of appeals, A-1 - A-5 (1982 opinion); A-186 - A-195 (1972 opinion), and the district court. A-64 - A-79 (1980 opinion); A-40 - A-45 (1979 opinion).

Prior Proceedings

"Tennessee's history of de jure segregation is well-established" (A-2). In 1955, when litigation aimed at desegregating the Nashville public schools began, racial segregation was constitutionally and statutorily mandated (A-2 - A-3). The school board's initial grade-a-year desegregation efforts resulted in de minimis desegregation because of transfer provisions which permitted parents to transfer a student to a school attended by pupils of the same race. 270 F.2d 209, 215 (6th Cir. 1959). This Court eventually held that such transfer provisions "promote discrimination and are therefore invalid." Goss v. Board of Education of Knoxville, 373 U.S. 683, 688 (1963).[2/] Substantial

---

2/ In 1963, the Nashville and Davidson County school systems were consolidated,

segregation, however, continued as a result of the school board's attendance zone, portable classroom, teacher assignment and school construction policies, which the lower courts found to have been designed and implemented to maintain segregation. A-190 - A-195; 436 F.2d 856, 859-61 (6th Cir. 1970); 317 F. Supp. 980, 989-92 (M.D. Tenn. 1970). "It therefore is clear that when the first 'comprehensive and potentially effective desergation order' was entered in this case in 1971, the existing racial separation in the Nashville schools had resulted from de jure segregation." A-3 (1982 opinion), quoting, 463 F.2d 732, 734

2/ continued

and the Nashville case was consolidated with a parallel desegregation action filed in 1960 against the Davidson County schools.

(6th Cir), cert. denied, 409 U.S. 1001 (1972).

The 1971 desegregation plan approved by the district court provided for desegregation of Nashville and central Davidson County public schools, but left white schools on the periphery of the county segregated. Memorandum Opinion of June 28, 1971. A range of 15%± the district-wide percentage of black students, then 25%, was adopted as a "starting point"[3/] for student assignment by agreement of all the parties. Desegregation of elementary grades was accomplished by pairing and closing schools, and assignment of pupils, and desegregation of secondary grades by school closings and student assignment. The district court also took efforts to

---

3/ Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 25 (1971).

prevent resegregation by enjoining use of portable classrooms to maintain segregation, expansion of schools exempt from desegregation requirements and all new school construction without prior court approval. Id.

However, only schools located in predominantly black neighborhoods were closed, a disproportionate burden of busing was imposed on black students at all levels and only black students in grades 1-4 were bused. Fully 1/3 of the county's white schools, located on the outskirts of the county, were exempt from the plan. Id. Nevertheless, the 1971 remedial order was affirmed over plaintiffs' objections. 463 F.2d 732 (6th Cir. 1972).

Post-1971 Proceedings

A year after the 1971 plan went into effect, the district court found that "the

integration plan was deficiently implemented" by the board and "the defendant school board ha[d] not make a good faith effort to comply with the court ordered integration plan" and "ha[d] endeavored to accomplish indirectly what it [could] not permissibly accomplish directly--the frustration of th[e district] court's plan to establish a racially integrated school system" by failing to "obtain sufficient buses to implement the court ordered integration plan." Order of August 17, 1972. The court thereupon ordered the school board to purchase sufficient buses to alleviate the hardships its practices had caused, and denied the board's motion to resegregate several junior high schools. The district court, however, failed to act on plaintiffs' request for more extensive desegregation and to eliminate the dispro-

portionate impact of school closings and transportation burden on black students.

Thereafter, from 1973-1978, the school board sought permission from the district court to engage in an extensive series of actions involving school construction, expansion of facilities, portable classrooms, the use of annexes and attendance zones. All these actions were opposed by plaintiffs as segregative and violative of the 1971 order. The district court declined to act. Notwithstanding the lack of court approval, all the proposals were implemented by the board. See A-40 - A-42.

It was not until 1979 that the district court held any hearings on the the board's 1973-1978 actions. The uncontradicted record, principally the testimony of school officials, established the board's widespread violation of the

1971 desegregation plan: The board had mounted an extensive construction program in predominantly white areas at a time the system was contracting, black innercity schools were underenrolled, and underutilized schools in black areas were being closed.[4/] A ring of comprehensive high schools had been built exclusively in white suburban areas while high schools in black inner city areas were closed or threatened with closing.[5/] Schools in white areas exempt from desegregation were expanded through the use of portable classrooms,

---

4/ E.g., 1979 Tr., Vol. II, pp. 89 -98, 933-36, 961-62, 964, 1027-33; Vol. III, pp. 27-32.

The board reported to the court that one of the reasons for its construction program was to accommodate "the reluctance of the white community to participate in the Court's plan." May 30, 1973 Petition, p. 2.

5/ E.g., 1979 Tr., Vol. II, pp. 876-77, 957-59.

additions, and annexes.[6/] School closing and construction policies resulted in imposing a greater burden of transportation on black students.[7/] No efforts were made to relieve segregation of black students or disproportionate transportation burden.[8/] No efforts were made to relieve overcrowding in white schools by assigning white students to underutilized schools in black

---

6/ E.g., 1979 Tr., Vol. I, pp. 162-65, 170-72, 200A-205; Vol. II, pp. 899-901, 930-31, 970-74.

16 of the 22 white suburban schools left segregated were expanded with the use of portable classrooms in the 1973-74 school year. At the 1979 hearings, the district court observed that "the establishment of ... annexes [at schools exempted from desegregation] bears the patent stamp of subterfuge." Tr. of June 26, 1979, Hearing, Vol. I, p. 200A.

7/ E.g., 1979 Tr. Vol. I, pp. 174-77, Vol. II, pp. 741-43, 752, 873-78.

8/ E.g., 1979 Tr., Vol. I, p. 129, Vol. II, pp. 853, 890-94, 1027-33.

neighborhoods.[9/]

After hearing this proof, the district court found that:

> 1. The perimeter line drawn by the Court in 1971, by which no requirement of either transportation or attempts at racial balance, was mandated outside the perimeter, has encouraged white flight to the suburbs, and to those school zones unaffected by the 1971 order. The combined effort of the order and the flight therefrom, either to suburban public schools or to private schools, has been:
>
> a) that inner city schools have become progressively resegregated;
>
> b) that the projected ideal ratio of 15 percent to 35 percent

---

9/ Board officials admitted that one of the reasons white students were not bused to inner city schools was deference to white hostility to desegregation. Tr. of June 26, 1979, Hearing, Vol. II at pp. 901, 932-36, 1038. As the district court put it, the board had deliberately decided to "accommodate white flight in the suburban areas" and "to follow the white flight" by its construction program instead of assigning students to existing schools." Tr. of June 26, 1979, Hearing, Vol. III, at pp. 28-29.

black population in each school has become increasingly more difficult to meet;

c) that the school facilities outside the Court-ordered perimeter have become increasingly inadequate to accommodate the growing student bodies.

2. The resegregation, resulting, at least in part, from the nonetheless good faith efforts of the School Board in the implementation of the Court's order, amounts to a de jure segregation.

A-44 - A-45, 479 F. Supp. 120, 122-23.[10/]

10/ Resegregative actions were initiated by the board up to the eve of trial. The court found that in 1978-79 the board initiated transfer option for students assigned to Pearl High School, a predominantly black school located in a black Nashville neighborhood, which was "utilized extensively by white students assigned to Pearl to escape such assignment. ... The effect of this policy upon the already-established trend toward resegregation at Pearl was disastrous." Id. at 124. The bord was directed to take immediate action because of "the urgency of the situation," but another transfer policy for Pearl was subsequently found to have "a negative impact upon the desegregation efforts of the School Board" in school year 1979-80. Id. 129.

The school board was ordered to and did file a proposed desegregation plan in February 1980, and further hearings were held. The board's plan provided for: (a) use of a range based on the 32% present black systemwide student enrollment as a starting point for student assignment; (b) continued placement of schools with grades 1-4 in white suburban areas and schools with grades 5-6 in inner city areas, requiring continued disproportionate burden of busing of younger black children; (c) assignment of most black junior high students to suburban junior high schools in white areas; and (d) retention and augmentation of its comprehensive high school, system. See A-86 - A-95.[11/]

11/ Plaintiffs opposed the board's proposal because of the disproportionate burden of busing imposed on black students,

The district court rejected the proposal because "the plan submitted by the Board disparately onerates young black children with the burden of achieving desegregation." A-113. However, the court questioned the lack of "realistic promise of achievement" of further desegregation in light of white flight and the "social, educational and economic costs of student transportation" A-114. Rejecting the use of any racial range reflective of district-wide enrollment as a starting point for student assignment, the court directed the board to file another plan which would provide for K-4 neighborhood schools, middle schools with a minimum presence of

---

11/ continued

discriminatory closing of schools in black areas, and failure to provide remedial and other programs for black students left in segregated schools.

15% either race (thus permitting 85% black schools and 85% white schools), a high school plan, including an inner city comprehensive school, the use of magnet schools, and remedial and other programs for black students. A-116 - A-127.

The board's 1981 plan provided for: (a) 47 of 75 K-4 schools more than 90% single race with 14 schools more than 75% black; (b) 24 middle schools with 7 projected to be majority black and assignment of black students to schools in outlying white areas but no assignment of sutdents from outlying areas to schools in black areas; and (c) remedial, multicultural and other programs. Exhibits 267-71. Plaintiffs' desegregative alternative pro-

posal was rejected,[12/] and the board's 1981 plan was adopted. A. 128.

Plaintiffs appealed. On August 19, 1981, the 1981 plan was stayed by the Sixth Circuit and the appeal expedited. A-155. The board's motion to vacate the stay was subsequently denied by Justice Stevens as Circuit Justice, Metropolitan County Board of Education v. Kelley, 453 U.S 1306 (1981), A-157, and then by the full Court. 50 U.S.L.W. 3198 (1981).

The Decision Below

On July 27, 1982, the Sixth Circuit issued its opinion which affirmed in part and reversed in part the judgment of the

---

12/ Under plaintiffs' alternative proposal, only 10 of the 75 K-4 schools were over 90% white and none over 90% black, and only 2 of the 24 middle schools were majority black. Exhibits 283-84.

district court, and remanded for further proceedings. A-1, A-22. First, the Court affirmed the finding of the board's continuing liability, i.e., that "despite the 1971 plan's potential, the record establishes and the District Court found that desegregation in the Nashville schools had never been achieved." A-3.

> [The Court's] determination that desegregation has never been achieved in the Nashville-Davidson County school system is amply supported by the record, and that finding, therefore, is affirmed. Thus the School Baord remains under its duty "to eliminate from the public schools all vestiges of state-imposed segregation." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971).

A-5.

Second, the "educational components" of the board's 1981 plan, including the remedial, Afro-American studies and other programs and a junior high school magnet program, were affirmed on the basis of

Milliken v. Bradley, 433 U.S. 267 (1977) (Milliken II). A-5 - A-6.

Third, the court of appeals affirmed all aspects of the middle and high school plan, except the use of the 15% either race minimal presence standard on the basis of Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).[13/] The court directed the use of a racial range based on districtwide enrollment as a "starting point." A-9, A-10.

13/ The Sixth Circuit stated that:

> The District Judge selected the admittedly arbitrary 15% either race figure because "it seem[ed] to represent a reasonable attempt to provide intercultural and interracial contact as a foundation for social harmony." 492 F. Supp. at 193. This selection, and such other errors as we find in the District Court's opinions and orders, originate with his apparent conclusion that the unanimous opinion of the Supreme Court in Swann has somehow been overruled or eroded. But

Fourth, the Court reversed the automatic exclusion of grades K-4, from a desegregation plan, and instructed the district court to include such students in a pupil assignment program "except where inclusion would 'risk the health of the children or significantly impinge on the educational

---

13/ continued
the disposition of cases originating in this and other circuits does not support any such conclusion. In fact, Swann was strongly reaffirmed by the Supreme Court's approval of this court's opinion in Penick v. Columbus Board of Education, 583 F.2d 787 (6th Cir. 1978), aff'd, 443 U.S. 449 81979). The Swann opinion is the law of the land. And this Court, the District Court for the Middle District of Tennessee, and the School Board of Nashville and Davidson County are required by our constitutional form of government to follow its standards. In accordance with those standards, the District Judge will be required on remand of this case to determine the currently prevailing racial population of the school system concerned and to employ that ratio as a "useful starting point in shaping a remedy to correct past constitutional violations."

process' within the meaning of Swann." A-19.

Fifth, the Court affirmed the denial of plaintiffs' claims that the 1981 plan itself placed a disproportionate transportation burden on black middle school students and that Pearl High School should be expanded into a comprehensive high school. A.-21. The district court also was ordered to consider long delayed faculty assignment, contempt and attorneys' fees issues. A-22. Last, the Court concluded that "[t]he delays in this case suggest that absolute priority be accorded to this litigation until a unitary system has been achieved." Id.

Judge Celebrezze concurred in the court's decision to affirm in part, but dissented from reversal of the student assignment plan. A-26.

On remand, the district court has yet to order a new student assignment plan.

REASONS TO DENY THE WRIT

1. Petitioner school board argues that Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976), absolved the board of any constitutional duty to desegregate once the 1971 plan was put into effect. Pet. 9-10. That contention is supported by neither Spangler nor any other authority, and can only be maintained by wholly ignoring specific factual findings of the board's own wrongdoing. The district Court found that the board's initial implementation efforts were "deficient," "not made [in] good faith" and intended to "frustrat[e]" the plan. See, pp. 6-7, supra. The courts below found that widespread resegregation subsequently occurred, and that "[t]he resegregation resulting at

least in part from the nonetheless good faith efforts of the School Board in the implementation of the Court's order, amounts to a de jure segregation." See, p. 12, supra. Findings that the board "violated the spirit of the 1971 order and emasculated desegregation efforts," A-5, were concurred in by both courts below, are not clearly erroneous and are entitled to substantial deference.[14/] "It is beyond dispute that Nashville has never achieved unitary status, in part because of the Board's implementation of the 1971 plan" A-11 n.5.

14/ Rodgers v. Lodge, ___U.S. ___, 50 U.S.L.W. 5041, 5044 (1982); Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1979); Berenyi v. Information Director, 385 U.S. 630, 635 (1967); Blau v. Lehamn, 368 U.S. 403 (1962); cf., Columbus Board of Education v. Penick, 443 U.S. 339, 468 (Burger, C.J., concurring).

In Spangler, on the other hand, a student assignment desegregation plan had been fully complied with, prior unconstitutional assignment practics cured and racial concentrations resulted solely from intervening demographic changes. Not only were no such findings made here: precisely contrary findings were made that the original constitutional violation was compounded by specific acts of the board which resegrgated the school system. See Columbus Board of Education v. Penick, 443 U.S. 449, 454-63 (1979).

The appropriate authority is cases in which a school district's default of its affirmative obligation to "effectuate a transition to a racially nondiscriminatory school system," Brown v. Board of Education, 349 U.S. 294, 301 (1955), required exercise of judicial authority. Columbus Board of

Education v. Penick, 443 U.S. 449, 458-59 (1979), affirming, 583 F.2d 878 (6th Cir. 1978); Dayton Board of Education v. Brinkman, 443 U.S. 526, 538 (1979), affirming, 583 F.2d 243 (6th Cir. 1978); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15-16 (1971); Green v. County School Board, 391 U.S. 430 (1968). The familiar rule in school desegregation litigation is that: "In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system," Swann, supra, 402 U.S. at 16,[15/] and that the

---

15/ The board erroneously ignored that "[e]ach instance of a failure or refusal to fulfill [its] affirmative duty continues the violation of the Fourteenth Amendment," Penick, supra, 443 U.S. at 458; Wright v. Council of City of Emporia, 407 U.S. 451, 460 (1972), that good faith alone is no bar to relief. Id.; Green, supra, 391 U.S 438-41.

obligation of a court is to "make a every effort to achieve the greatest degree of actual desegregation, taking into account the practicalities of the situation." Davis v. School Comm'rs of Mobile County, 402 U.S. 33, 37 (1971).

2. Nor is any substantial federal question or conflict among the circuits presented by the decision of the court

---

15/ continued

The board's suggestion that resegregtion occurred solely because of interim demographic changes and residential segregation is contrary to specific factfindings, see pp. 11-12, supra, and unsupported by the record. The only evidence presented by the board was a statistical comparison of student enrollment from 1967-70 and 1971-79, which did not take into account the board's implementation actions or any other factor. Tr. of March 3, 1980, Hearing, Vol. VII, pp. 6280-6320. Such proof cannot pretend to meet the requirements of Penick, supra, 443 U.S at 465 n.13; Keyes v. School District No. 1, 413 U.S. 189, 202-03 (1973). In any event, school officials noted that demographic change was underway prior to the 1971 plan. Tr. of June 26, 1979, Hearing, Vol. II, p. 729.

of appeals that a 15% either race minimum presence standard for secondary schools did not promote desegregation. Pet. 11. The court below was correct that the minimum presence standard was unnecessarily segregative,[16/] unprecedented, "admittedly arbitrary," and adopted for reasons other than curing unconstitutional segregation, i.e., "'a reasonable attempt to provide intercultural and interracial contact as a foundation for social harmony.'" See, p. 20 n.13, supra. The court was plainly correct in its commonsense direction to the district court to use a range based on districtwide racial proportion as a "'useful starting point in shaping a remedy to correct past constitutional violations,'"

16/ Under plaintiffs' alternative proposal, which was based on the board's 1981 plan, greater levels of desegregation were achieved. See p. 16 n.12, supra.

A-9, quoting, Swann, supra, 402 U.S. at 25.

The Sixth Circuit did no more than carefully and conscientiously reiterate at length the dictates of Swann, A-7 - A-10, for the guidance of the district court.[17/] Such guidance was appropriate because unitary status had not been ac-

---

17/ The court stated that Swann recognized "that there is no constitutional right to any 'particular degree of racial balance,'" but also that "'in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition.'" A-10.

The court below emphasized that:

> An essential element of the plan on remand thus will include "reassigning students to achieve the greatest possible number of desegregated schools." See Liddell v. Board of Education of City of St. Louis, 667

hieved after 27 years of litigation, the district court in fact had adopted an erroneous standard, and the district court operated under the mistaken notion that Swann was not binding. As the court put it, its directives were "made necessary by our view that 'a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is ... intolerable'" A-11

17/ continued

> F.2d 643 (8th Cir. 1981). We reemphasize that we are not requiring any precise degree of racial mixing, but we are requiring the District Court to use all reasonable methods of pupil assignment to achieve the maximum amount of integration possible.

A-11 n.5. The lower court thus did not require imposition of a "fixed racial quota." Pet. 12. Nor is there any conflict with Liddell, Pet. 13, which was specifically cited for the guidance of the district court.

n.5, quoting, Green supra, 391 U.S. at 438.

The decision of the court of appeals to give the district court specific guidance was made on the basis of its substantial experience with the litigation gained over the course of hearing five appeals.[18/] See pp. 1-2 n.1, supra. The decision was entirely proper and no review is necessary. Moreover, no claim could be made that use of a Swann student assignment range is inappropriate in Nashville: the school board agreed both in 1971 and in 1980 that such a standard was appropriate and filed plans which used comparable ranges. See pp. 5, 13, supra.

3. Nor is it necessary for the Court to review the lower court's equitable in-

---

18/ Chief Judge Edwards, author of the opinion below, has authored the last three appellate decisions.

struction to the district court that children in lower grades should be included in a desegregation plan "except where inclusion would 'risk the health of the children or significantly impinge on the educational process' within the meaning of Swann." A-19. That instruction comports in every way with Swann, supra, 402 U.S. at 29-31, and is consistent with all lower court authority.[19/] This is not a case in which circumstances exist which make

---

19/ E.g., Adams v. United States, 620 F.2d 1277 (8th Cir.), cert. denied, 449 U.S. 826 (1980); Lee v. Macon County Board of Education, 616 F.2d 805 (5th Cir. 1980); Haycraft v. Board of Education, 585 F.2d 803, 805 (6th Cir.), cert. denied, 443 U.S. 915 (1979); Keyes v. School District No. 1, 521 F.2d 465 (10th Cir. 1975), cert. denied, 423 U.S. 1066 (1976); Flax v. Potts, 464 F.2d 865 (5th Cir.), cert. denied, 409 U.S. 1007 (1972).

The lower court's extensive discussion of the relevant precedent, A-17 - A-19 n.9, clearly demonstrates that no conflict exists.

the busing of students in lower grades inappropriate or in which prior practices need be changed: every black student in grades 1-4 residing in central Davidson County has been bused to schools in white suburban areas since 1971. See pp. 5-6, supra.

4. Last, the school board argues that the court of appeals somehow "ignored the standards of review articulated by this Court for review of a desegregation decree." Pet. 15. The court below, however, plainly stated that "the District Court's approval of the Board's plan was [both] legal error" and "an abuse of discretion," A-20 n.11, and accompanying text, because the district court's remedial rulings bore no relationship to undisputed findings of continuing constitutional violation, were not intended to cure unconstitutional

segregation and were inconsistent with this Court's basic jurisprudence in school desegregation cases. As the lower court put it, this case "offers no new legal issues and can and must be decided on the basis of final decisions of the United States Supreme Court." A-2. Plainly, the directions of the court below to apply the teachings of Swann and other authority on remand cannot be characterized as pressing the limits of an appellate court's powers.

The board erroneously suggests that the failure of the 1971 plan to include "educational components" was a serious equitable defect which the court of appeals ignored. Pet. 17-19. The Sixth Circuit, of course, affirmed the 1981 plan's "educational components."[20/]

20/ Moreover, the record does not support any claim that student transportation

---

20/ continued
remedies have had adverse consequences on the achievement of black students. The entire record below on this issue consists of testimony by plaintiffs' educational consultant that one-way busing of black students in grades 1-4 to outlying white schools was bad educational policy that had adverse impact on the education of black students. Suppl. Record 184, pp. 10-13, 40-41, 59-65, 131-33, 317-18. The remedy proposed was that busing of students in grades 1-4 involve proportional numbers of black and white students so that some black lower grade students would be able to attend schools in their neighborhoods, and that the board devise programs for students bused to schools outside their neighborhoods that addressed the need to provide a supportive learning environment and continuity of instruction. Id. Moreover, recent dispositive social science evidence cited by the court of appeals in its appendix, A-11 - A-26, documents that desegregation raises the achievement levels of black students.

The board's related claim that plaintiffs' request for "educational components" and equitable distribution of the burdens of desegregation compromised their request for more effective desegregtion, Pet. 5, is incorrect. Milliken v. Bradley, supra (remedial programs); Monroe v. Board of Comm'rs, 391 U.S 450, 458 (1968) (a school board may not desegregate in a "deliberately discriminatory manner"). After full briefing below, neither the majority nor dissent gave the claim any credence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

*JACK GREENBERG
*JAMES M. NABRIT, III
THEODORE M. SHAW
BILL LANN LEE*
Suite 2030
10 Columbus Circle
New York, New York 10019
(212) 586-8397

AVON N. WILLIAMS, JR.
RICHARD H. DINKINS
203 Second Avenue, North
Nashville, Tenn. 37201
(615) 244-3988

*Counsel of Record

Attorneys for Respondents